

2003

Jamie Medved v. C. Joseph Glenn, M.D. and Estate Blayne L. Hirsche, M.D. : Brief of Appellant

Utah Court of Appeals

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JAMIE MEDVED,)	Case No. 20030338-CA
)	
Plaintiff and Appellant,)	Trial Court No. 010400960
)	
vs.)	
)	
C. JOSEPH GLENN, M.D. AND ESTATE)	
BLAYNE L. HIRSCH, M.D.)	
)	
Defendants and Appellees.)	
)	

AN APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT,
IN AND FOR UTAH COUNTY, PROVO BRANCH, STATE OF UTAH
THE HONORABLE LYNN W. DAVIS

Attorneys for Appellant

FILED
Utah Court of Appeals
NOV 14 2003
Paulette Stagg
Clerk of the Court

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IN AND FOR UTAH COUNTY, PROVO BRANCH, STATE OF UTAH
THE HONORABLE LYNN W. DAVIS

Attorneys for Appellant

LIST OF PARTIES

Appellant

Plaintiff: Jamie Medved

Appellees

Defendants: C. Joseph Glenn, M.D.

Estate of Blayne L. Hirsche, M.D.

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UTAH COURT OF APPEALS

JAMIE MEDVED,

Plaintiff and Appellant,

vs.

C. JOSEPH GLENN, M.D. AND ESTATE)

BLAYNE L. HIRSCH, M.D.)

Defendants and Appellees.)

) Case No. 20030338-CA

) Trial Court No. 010400960

JURISDICTIONAL STATEMENT

The Utah Court of Appeals has original jurisdiction pursuant to Utah Code Annotated §78-2-2(f)(3)(j).

ISSUES PRESENTED AND STANDARD OF REVIEW

The issues on appeal relate to the District Court's granting of Defendants' Motion to Dismiss Plaintiff's Complaint:

1. Is the loss of Plaintiff's breast due to Defendants' negligent failure to diagnose cancer, a legally cognizable injury?
2. Is the loss of a breast an actual injury under Utah law?
3. Does a Plaintiff who has had more extensive surgery as a result of Defendants' negligence have to wait until she has a recurrence of cancer to state a claim upon which relief may be granted?

4. Did the District Court error in dismissing Plaintiff's Complaint because she lost her breasts, but did not have a recurrence of cancer?

On review of a grant of a motion to dismiss Plaintiff's Complaint under 12(b)(6) of the Utah Rules of Civil Procedure, the Complaint is entitled to the benefit of not only all allegations of the Complaint, but also from the inferences in the light most favorable to the Plaintiff. *Ellis v. Social Service of Church of Jesus Christ of Latter Day Saints* 615 P.2d 1250 (Ut. 1980); *Mountaineer v. Utah Power & Light* 823 P.2d 1055 (Ut. 1991). The allegations of Plaintiff's Complaint are deemed to be true. *Brown v. Weis* 871 P.2d 552 (Ut. 1994).

Disposition In Lower Court

1. On November 20, 2002, oral arguments were heard on Defendants' Joint Motion for Dismissal Without Prejudice.
2. On November 26, 2002, the Court was advised that Blayne Hirsche, M.D. had died in a plane accident. On December 10, 2002, pursuant to Stipulation, the Estate of Blayne Hirsche was substituted as a party Defendant.
3. On March 19, 2003, the Court granted Defendants' Joint Motion.
4. Plaintiff filed her Notice of Appeal on April 8, 2003.
5. Plaintiff's Docketing Statement was filed on April 28, 2003.

DETERMINATIVE RULES AND STATUTES

The interpretation of the following statutes and case law are involved in this appeal:

1. *George v. LDS Hospital*, 797 2d 1117 (Ut. App. 1990)
2. *Seale v. Gowans*, 923 P.2d 1361 (Ut. 1996)
3. *Restatement of Torts*, §323.

STATEMENT OF THE CASE

A. Nature of the Case

On December 28, 1998, Plaintiff underwent a right radical mastectomy as a result of Defendants' negligent failure to timely diagnose breast cancer. Plaintiff later had chemotherapy and radiation as well as a surgical reconstruction of her breast. Plaintiff's Complaint alleges that as a result of Defendants' negligence, her diagnosis was delayed resulting in her having a mastectomy, intensive chemo and radiation therapies and subsequent reconstruction of her breast. Plaintiff also remains at an unnecessarily high risk of recurrence. Plaintiff alleged that had the diagnosis been made timely, she would not have had the extensive surgery and resulting reconstruction of her breast.

B. Statement of Facts

The following facts are admitted by the parties or not in material dispute:

1. Plaintiff first saw Dr. Glenn as a patient in 1991.
2. Plaintiff's last visit with Dr. Glenn was February 27, 1998.

3. During the time Plaintiff was Dr. Glenn's patient, she was diagnosed with fibrocystic breast disease.

4. Plaintiff first saw Dr. Hirsche as a patient on July 13, 1998.

5. A mammogram, ordered by Dr. Hirsche and performed on July 20, 1998, revealed dense fibroglandular tissue bilaterally.

6. On August 12, 1998, Dr. Hirsche performed bilateral breast augmentation and aspiration of three suspected right breast cysts.

7. On December 12, 1998, Dr. Hirsche performed an excisional biopsy of three right breast nodules.

8. The pathological examination associated with the December 12, 1998, excisional biopsy revealed the presence of differentiated infiltrating ductal carcinoma.

9. On December 28, 1998, Steven J. Mintz, M.D. performed a right modified radical mastectomy.

10. Plaintiff followed her surgical treatment with chemotherapy and radiation therapy and later had surgical reconstruction.

11. Plaintiff has not had a recurrence of her cancer.

SUMMARY OF ARGUMENT

The District Court failed to follow Utah law and incorrectly granted Defendants' Joint Motion to Dismiss.

Plaintiff's Complaint alleges that Defendants negligently delayed diagnosis of her cancer and, as a result, Plaintiff (a) sustained actual damages by undergoing more extensive treatment and surgery, including a radical mastectomy and (b) has an increased risk of recurrence.

Utah has recognized that liability may be imposed where negligence increases a party's risk of harm in *George v. LDS Hospital* 797 P.2d 1117 (Utah App. 1990). In *Seale v. Gowans* 923 P.2d 1361 (Utah 1996), that right was limited to cases where the increased risk of harm is accompanied by actual damages.

Plaintiff alleged in her Complaint, (which under a motion to dismiss are deemed to be true), that she sustained actual damages as well as an increased risk of recurrence. Plaintiff has, therefore, stated a claim upon which relief can be granted.

ARGUMENT

I. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE PLAINTIFF HAS PLED THAT AS A RESULT OF DEFENDANTS' DELAY IN DIAGNOSIS, SHE SUSTAINED ACTUAL DAMAGES AND HAS AN INCREASED RISK OF CANCER RECURRENCE.

A. In A Motion To Dismiss, All Of Plaintiff's Allegations In Her Complaint Are Deemed To Be True.

On a Motion to Dismiss Plaintiff's Complaint under 12(b)(6), of the Utah Rules of Civil Procedure, the Complaint is entitled to the benefit of not only all allegations in the Complaint, but also from the inferences in the light most favorable to Plaintiff. *Ellis v.*

Social Services of Church of Jesus Christ of Latter-Day-Saints 615 P.2d 1250 (Utah 1980), *Mountaineer v. Utah Power & Light Co.* 823 P.2d 1055 (Utah 1991). The allegations in Plaintiff's Complaint are deemed to be true. *Brown v Weis* 871 P.2d 552 (Utah 1994).

B. Plaintiff Has Pled That She Sustained Actual Damages And Has An Increased Risk of Recurrence of Cancer As A Result of Defendants' Delay In Diagnosis.

Plaintiff's Complaint alleges that as a result of Defendants' delay in diagnosis that she sustained actual damages as a result of the Defendants' negligence:

13. On December 16, 1998, the biopsies were carried out by Dr. Hirsche. These revealed infiltrating ductile carcinoma at all three sites. In late December of 1998, Ms. Medved underwent a right mastectomy. Since the tumor involved eight lymph nodes, it was also necessary to have the lymph nodes removed. She also underwent chemotherapy and radiation therapy after the surgery.

* * *

17. As a proximate result of the above-described negligence of Dr. Glenn, Jamie Medved's diagnosis of her breast cancer was delayed resulting in her having to undergo a mastectomy and axillary node dissection, intensive chemotherapy and radiation therapy and she remains at a very high risk of recurrence, has endured pain and suffering, disfigurement, loss of enjoyment of life and, other general damages in an amount to be proven at trial.

18. As a proximate result of the above-described negligence of Dr. Glenn, Plaintiff has incurred medical expenses, and, will undoubtedly incur future medical

expenses and, other special damages including, but not limited to loss of income and loss of economic opportunities, in an amount to be proven at trial.

Since the allegations of Plaintiff's Complaint are deemed to be true, the issue is whether the Defendants' failure to timely diagnose breast cancer which results in a right radical mastectomy and produces an increased risk of the recurrence of cancer, states a claim for relief under Utah law.

C. Actual Damages In Conjunction With An Increased Risk of Cancer Recurrence Is Sufficient To Sustain A Claim For Negligence.

In addition to actual damages, (radical mastectomy), Plaintiff has alleged that she has an increased risk of recurrence of cancer. In *George v. LDS Hospital* 797 P.2d 1117 (Utah App. 1990), the court recognized a claim for loss of chance. It cited with approval *James v. United States* 483 F.Supp. 581, 585 (N.D.C.A. 1980):

"Evidence which shows a reasonable certainty that negligent delay in diagnosis or treatment increased or lessened the effectiveness of treatment is sufficient to establish proximate cause." *Id.* at 585.

The Court also approved *Hicks v. United States* 368 F.2d 626 (4th Cir. 1966) and its conclusion that Defendant's "negligence nullified whatever chance of recovery she might have had and was the proximate cause of the death." *Id.* at 633. The court in *George, supra*, similarly cited with approval *Goff v. Doctors General Hospital of San Jose* 333 P.2d 29 (Cal. 1958) (where the "chance of saving a patient's life would have

been increased if a physician had been timely notified" and whether this negligence was a cause of death was a jury question.) *Hamil v. Bashline* 392 A.2d 1280 (Pa. 1978) and the Restatement (Second) of Torts § 323¹

In *George*, the Plaintiffs brought a wrongful death action against the hospital. Following a jury verdict in favor of the hospital, the Supreme Court reversed for new trial. The Court found that a jury could have reasonably concluded that the hospital's negligence prevented doctors from treating and possibly saving patients' life but that the jury instructions prevented it from meaningfully considering the expert testimony.

Under *George v. LDS Hospital, supra.*, then, a party is subject to liability if his negligent conduct increases the risk of harm, lessens the effectiveness of treatment or decreases a chance of survival. *Id.* at 1117.

In *Seale v. Gowans*, 923 P.2d 1361 (Utah 1996), the Utah Supreme Court conditioned that right of recovery to cases where the Plaintiff presents proof of actual damages. It did not abolish the claim for enhanced risk or overturn the ruling in *George v. LDS Hospital, supra.* In their Motion to Dismiss, Defendants cite, the following language from *Seale*: "[A]n alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence." (Defendants' Memorandum in Support at p.4.) The complete quotation is, in fact:

¹"One who undertakes...to render services to another...is subject to liability...if (a) his failure to exercise [reasonable] care increases the risk of such harm."

Although we agree that the cancers spread resulted in a dramatic decrease in Ms. Seale's chance of survival, we concluded that without proof of actual damages, an alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence. (Emphasis added.)

The Court in *Seale* discussed *Colbert v. Georgetown Univ.* 641 A.2d 469 (D.C. 1994), and *Swain v. Curry* 595 So.2d 168 (Dist. Ct. App. 1992), where risk of recurrence of cancer was approved, as a basis of liability. The Utah Supreme Court found that:

In these cases [*Colbert* and *Swain*] the evidence showed that the Plaintiffs had suffered actual damages in conjunction with the increased risk of the cancers recurrence." *Id.* at 1366.

The Court distinguished those cases from Ms. Seale's who did not allege she had actual damages as a result of the delay in diagnosis. Seale had a mastectomy and more extensive surgery in 1988, but did not sue until 1991. She did not allege the 1988 actual damages (mastectomy) in her 1991 suit because she was barred by the statute of limitations from such assertion. She, therefore, sued only for the risk of recurrence of cancer.

The issue in *Seale* was whether that claim was barred by the statute of limitations. Ms. Seale went to Dr. Gowans for a mammogram in August 1987. Dr. Gowans failed to detect a cancerous mass in Ms. Seale's breast. The mass was not discovered until May, 1988. Ms. Seale had a radical mastectomy a short time later. The pathology report of the removed tissue showed that the cancer had spread to eight of Ms. Seale's twenty lymph

nodes. Although Ms. Seale was told that the finding of cancer in her lymph nodes increases the possibility that cancer would recur in other parts of her body, Ms. Seale did not bring an action against Dr. Gowans at that time.

Ms. Seale tested negative for cancer until August 1991, when a bone scan showed cancer in her hip. Ms. Seale then brought an action against Dr. Gowans for negligent delay in diagnosing her cancer. Based on the jury's finding that Ms. Seale discovered or should have discovered her injury in June 1988, when she was correctly diagnosed with breast cancer, the trial court held that Ms. Seale's action was barred by the medical malpractice act's two-year statute of limitations, Utah Code Ann. § 78-14-4. The Utah Supreme Court reversed, holding that, under the particular facts of the case, the statute of limitations did not begin to run until the cancer returned in Ms. Seale's hip.

Dr. Gowans argued that the injury that triggered the running of the statute of limitations was the cancer's spread to Ms. Seale's lymph nodes, "which statistically increased the chance that cancer would recur and thus decreased her chance of long-term survival." 923 P.2d at 1364 (footnote omitted). The court held that "damages in the form of an enhanced risk *only* are not sufficient to start the running of the statute of limitations." *Id.* at 1365 (emphasis added). The court noted the general rule that, until a plaintiff suffers "actual harm or damages, the limitations period will not accrue." *Id.* at 1364. The court emphasized that the defendant had the burden of proving that the

plaintiff had suffered some "actual harm or damages" before August 1989 and concluded that the defendant had not met his burden:

[D]efendants failed to prove that Ms. Seale suffered a legally cognizable injury when she discovered that the cancer had spread to her lymph nodes. The only evidence that defendants produced regarding the harmful consequence of the cancer's spread was that it increased the risk that the cancer would recur. *They failed to argue or produce evidence that in 1988, Ms. Seale could complain of any actual present damages.* Although we agree that the cancer's spread resulted in a dramatic decrease in Ms. Seale's chance of survival, we conclude that *without proof of actual damages*, an alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence. ...

...

Because the only evidence defendants presented at trial, and the only evidence Ms. Seale could marshal, showed that Ms. Seale could not have discovered any legally cognizable injury until 1991, we find that the evidence was insufficient for a jury to find that Ms. Seale discovered her injury in 1988.

Id. at 1364-65, 1366 (emphasis added).

In other words, the holding in *Seale* was based upon the parties' arguments and the evidence at trial that the only injury Ms. Seale suffered as a result of Dr. Gowans' negligence before her cancer recurred in 1991 was the possibility that her cancer would recur. The court found this a legally insufficient injury, absent some "actual harm or damages." *See Id.* at 1364. *See also Id.* ("once some harm is manifest, the limitations period begins to run on all claims") (emphasis added and citation omitted).

The Court did not rule or hold that Ms. Seale could not have sued in 1988 for actual damages or that she could not recover for enhanced risk or loss of chance. The Court *only* held that without actual damages, which were not alleged or sought, she could not have filed suit in 1988 for loss of chance.

By contrast, Mrs. Medved has alleged "actual harm or damages" resulting from Defendants' negligence, as well as the enhanced risk that her cancer will recur. As previously discussed, those allegations are assumed to be true in a Motion to Dismiss. Specifically, Mrs. Medved has alleged that, but for Defendants' negligence, she would not have required a modified radical mastectomy, and she would not have undergone the cost of more extensive therapy, which caused her pain, suffering and inconvenience.

II. TO THE EXTENT DEFENDANTS' MOTION IS DEEMED A MOTION FOR SUMMARY JUDGMENT, IT SHOULD ALSO HAVE BEEN DENIED.

Summary judgment is appropriate only if the undisputed material facts demonstrate that the moving party is entitled to judgment as a matter of law. *Territorial Sav. & Loan v. Baird* 781 P.2d 452 (Utah 1989.) Even if the District Court found that under *Seale v. Gowans* Plaintiff cannot recover for loss of chance (increased risk of cancer), the Court could not have ruled that Plaintiff is barred from recovery for the actual damages she has already sustained. If Defendants' Motion to Dismiss is considered a Motion for Summary Judgment, (i.e., that as a matter of law, Plaintiff is not entitled to relief for her claim,) it should also be denied.

As a matter of law, Plaintiff has made a claim for relief which is legally cognizable. Plaintiff's Complaint alleges that as a result of Defendants' delay in diagnosis, she underwent more extensive surgery and treatment and has an increased risk of recurrence of cancer.

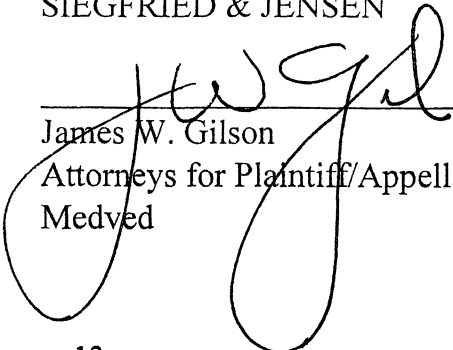
As discussed above, a Plaintiff who alleges she has sustained actual damages in conjunction with an increased risk of recurrence of cancer, has made a legally cognizable claim under Utah law. *George v. LDS Hospital, supra.*, and *Seale v. Gowans, supra.* As a matter of law, Plaintiff has stated a claim upon which relief may be granted and, thus, is entitled to relief for that claim.

CONCLUSION

Plaintiff's Complaint alleges that she sustained actual damages as a result of Defendants' delay in diagnosing her cancer. She is, therefore, entitled to all damages she has sustained, including all foreseeable consequences and those within reasonable medical certainty, caused by Defendants' negligence. Under Utah law, those consequences include the increased risk of harm caused by Defendants.

Dated this 13 day of November, 2003.

SIEGFRIED & JENSEN



James W. Gilson
Attorneys for Plaintiff/Appellant, Jamie
Medved

UTAH COURT OF APPEALS

JAMIE MEDVED,

Plaintiff and Appellant,

vs.

C. JOSEPH GLENN, M.D. AND ESTATE
BLAYNE L. HIRSCH, M.D.

Defendants and Appellees.

CERTIFICATE OF DELIVERY

Case No. 20030338-CA

Trial Court No. 010400960

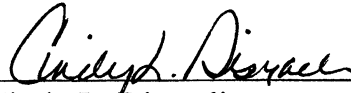
I, Cindy Disraeli, hereby certify that I have this 14th day of November, 2003,
served the foregoing **APPELLANT'S OPENING BRIEF**, to all interested parties to this
matter by hand delivering a true and correct copy, to:

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Cindy L. Disraeli

ADDENDUM

Exhibit A - Complaint

Exhibit B - Defendants' Joint Motion for Dismissal Without Prejudice

Exhibit C - Plaintiff's Response to Defendants' Joint Motion for
Dismissal Without Prejudice

Exhibit D - Joint Reply Memorandum in Support of Defendants' Motion
for Dismissal Without Prejudice

Exhibit E - Motion to Take Judicial Notice of the Certified Copy of
Complaint in *Seale v. Gowans*

Exhibit F - Order Granting Defendants' Motion for Dismissal Without
Prejudice

Exhibit A

STATE DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
01 MAR -5 AM 10:17

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IN THE FOURTH JUDICIAL DISTRICT COURT

IN AND FOR UTAH COUNTY, STATE OF UTAH

JAIME MEDVED,

Plaintiff,

**C. JOSEPH GLENN, M.D. AND BLAYNE
L. HIRSCH, M.D.**

Defendant.

)
)
)
) **COMPLAINT**
) **(Demand for Jury Trial)**
)

) **Civil No. 010400960**
)

) **Judge: 9**
)

Plaintiff, Jaime Medved, by and through the undersigned counsel, hereby complains of the Defendants C. Joseph Glenn, M.D. and Blayne L. Hirsche, M.D., and for cause of action alleges as follows:

JURISDICTION AND VENUE

1. For all causes of action hereinafter stated, Plaintiff invokes the jurisdiction of this court under Utah Code Ann. § 78-3-4 (1953, as amended).

2. Defendant, C. Joseph Glenn, M.D., is a resident of Utah County, with his principal place of business in Utah County, state of Utah. The venue of this Court is therefore proper pursuant to Utah Code Ann. § 78-13-7 (1953, as amended).

3. Defendant, Blayne L. Hirsche, M.D., is a resident of Utah County, with his principal place of business in Utah County, state of Utah. The venue of this Court is therefore proper pursuant to Utah Code Ann. § 78-13-7 (1953, as amended).

4. Plaintiff, Jaime Medved, is a resident of Utah County, state of Utah.

5. Plaintiff has complied with all required conditions precedent with respect to the service of a Notice of Intent to Commence Action and with respect to participation in a Panel Review of alleged medical malpractice involving the Defendants, pursuant to Utah Code Ann. § 78-14-1, *et seq.* Plaintiff is therefore entitled to bring this action.

FACTUAL ALLEGATIONS

6. The Plaintiff, Jaime Medved, had been seeing Dr. Glenn as her OB/Gyn physician. In August of 1997, she saw Dr. Glenn complaining of a lump in her right breast. Dr. Glenn noted that she had a 2 millimeter superficial lump in her right breast along with fibrocystic changes of both breasts. He told the patient to check herself and to follow-up if she determined that the tumor had changed.

7. Based upon Dr. Glenn's reassurance, Ms. Medved did not return to see him until February 27, 1998. Dr. Glenn noted fibrocystic changes, asymmetrical, right much greater than left and tender. He indicated that he would refer Ms. Medved to Dr. Fullmer, if the lump did not

go down following her next menstrual cycle, but he failed to schedule any follow-up and failed to order a mammogram.

8. On July 13, 1998, Ms. Medved saw Dr. Blayne Hirsche, a plastic surgeon, to have the lumps removed and also to ask him about breast augmentation. Dr. Hirsche identified “numerous cysts” of the right breast. Dr. Hirsche recommended a mammogram and then proceeded with breast augmentation and aspiration of the cysts at the time of surgery.

9. On July 20, 1998, Ms. Medved obtained a mammogram and the report noted dense fibroglandular breast tissue bilaterally. The report further stated that there was no evidence of malignancy, however, the breast is heterogeneously dense. This may lower sensitivity of mammography.

10. Dr. Hirsche performed surgery on August 12, 1998 for breast augmentation. During that surgery, he used an 18 gauge needle to aspirate the three cystic areas. He noted that all three were aspirated with only a small amount of fluid being obtained. The areas appeared to be solid. No biopsy was done nor was the fluid sent for pathology.

11. In a post-operative visit on August 14, 1998, Dr. Hirsche discussed with Ms. Medved the need to have the breast lesions removed and that the procedure could be set up in approximately four to five weeks.

12. On September 18, 1998, Dr. Hirsche again saw Ms. Medved and noted that the cysts in the right breast were decreasing in size but were still tender, sore and enlarged. He recommended evaluating them again in three months. On December 14, 1998, Dr. Hirsche examined Ms. Medved and recommended excisional biopsy of the breast lesions.

13. On December 16, 1998, the biopsies were carried out by Dr. Hirsche. These revealed infiltrating ductile carcinoma at all three sites. In late December of 1998, Ms. Medved underwent a right mastectomy. Since the tumor involved eight lymph nodes, it was also necessary to have the lymph nodes removed. She also underwent chemotherapy and radiation therapy after the surgery.

FIRST CAUSE OF ACTION

(MEDICAL NEGLIGENCE OF DEFENDANT C. JOSEPH GLENN, M.D.)

14. Plaintiff re-alleges and incorporates herein, the allegations of paragraphs 1 through 13, above.

15. The Defendant, Dr. Glenn, owed a duty of care to Jaime Medved which required him to act reasonably and in a careful and prudent manner in providing medical care and attention to Ms. Medved.

16. The Defendant, Dr. Glenn, was negligent and breached his duty of care to Jaime Medved. Dr. Glenn's negligence includes, but is not limited to the following acts and/or omissions:

- a) Defendant, Dr. Glenn, evaluated Jaime Medved, noted that she had lumps in her breast, but failed to have her follow-up appropriately with him for further screening;
- b) Defendant, Dr. Glenn, failed to obtain a mammogram;
- c) Defendant, Dr. Glenn, negligently recommended that the patient herself determine whether the lumps were enlarging or not;
- d) Any other negligent acts or omissions which discovery may reveal.

17. As a proximate result of the above-described negligence of Dr. Glenn, Jaime Medved's diagnosis of her breast cancer was delayed resulting in her having to undergo a mastectomy and axillary node dissection, intensive chemotherapy and radiation therapy and she remains at a very high risk of recurrence, has endured pain and suffering, disfigurement, loss of enjoyment of life and, other general damages in an amount to be proven at trial.

18. As a proximate result of the above-described negligence of Dr. Glenn, Plaintiff has incurred medical expenses, and, will undoubtedly incur future medical expenses and, other special damages including, but not limited to loss of income and loss of economic opportunities, in an amount to be proven at trial.

SECOND CAUSE OF ACTION

(MEDICAL NEGLIGENCE OF DEFENDANT, BLAYNE L. HIRSCH, M.D.)

19. Plaintiff re-alleges and incorporates herein the allegations of 1 through 13, above.

20. The Defendant, Dr. Hirsch, owed a duty of care to Jaime Medved which required him to act reasonably and in a careful and prudent manner in providing medical care and attention to Jaime Medved.

21. The Defendant, Dr. Hirsch, was negligent and breached his duty of care to Jaime Medved. Dr. Hirsch's negligence includes, but is not limited to, the following acts and omissions:

a) Defendant, Dr. Hirsch, failed to remove the breast tumors at the time he did surgery and when he discovered that he was dealing with a solid mass and not a cyst;

- b) Defendant, Dr. Hirsche, negligently went ahead with the breast augmentation surgery which further delayed diagnosis of cancer;
- c) Defendant, Dr. Hirsche, misdiagnosed Ms. Medved's serious condition;
- d) Defendant, Dr. Hirsche, failed to provide adequate diagnostic tests and follow-up treatment; and
- e) Any other negligent acts or omissions which discovery may reveal.

22. As a proximate result of the above-described negligence of Dr. Hirsche, Jaime Medved's diagnosis of her breast cancer was delayed resulting in her having to undergo a mastectomy and axillary node dissection, intensive chemotherapy and radiation therapy and she remains at a very high risk of recurrence, has endured pain and suffering, disfigurement, loss of enjoyment of life and, other general damages in an amount to be proven at trial.

23. As a proximate result of the above-described negligence of Dr. Glenn, Plaintiff has incurred medical expenses, and, will undoubtedly incur future medical expenses and, other special damages including, but not limited to loss of income and loss of economic opportunities, in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief against the Defendants, and each of them, as follows:

- A. For general damages, including but not limited to damages for pain and suffering, loss of enjoyment of life in amounts as may be proven at trial;
- B. For medical expenses both past and future in an amount to be proven at trial;

- C. For lost wages and economic opportunities in an amount to be proven at trial;
- D. For costs and expenses incurred in this proceeding; and
- E. For interest on all special damages and for other such and further relief as this

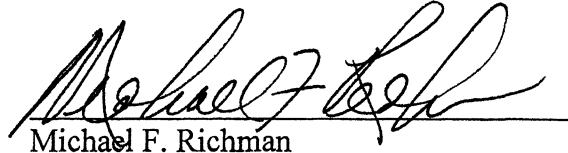
Court may deem just and proper under the circumstances.

JURY DEMAND

Plaintiff requests a trial by jury and has enclosed the statutory fee herewith.

DATED this 28th day of February, 2001.

MICHAEL F. RICHMAN & ASSOCIATES


Michael F. Richman

Plaintiff's Address:
490 South 1100 West
Orem, UT 84058

Exhibit B

4TH DISTRICT COURT
PROVO DEPARTMENT

2002 AUG -2 1:47

Dennis C. Ferguson [A1061]
WILLIAMS & HUNT
257 East 200 South, Suite 500
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Attorneys for Defendant
Blayne L. Hirsche, M.D.

Curtis J. Drake [A0910]
Anne D. Armstrong [A8886]
SNELL & WILMER, LLP
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Salt Lake City, Utah 84101
Telephone: (801) 257-1900
Facsimile: (801) 257-1800
Attorneys for Defendant
C. Joseph Glenn, M.D.

**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH**

JAMIE MEDVED,

Plaintiff,

v.

C. JOSEPH GLENN, M.D., and BLAYNE
L. HIRSCH, M.D.,

Defendants.

**DEFENDANTS' JOINT MOTION
FOR DISMISSAL
WITHOUT PREJUDICE**

Case No. 010400960

Division 9

Judge Fred D. Howard

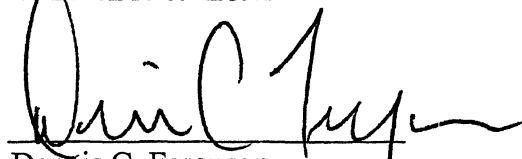
Defendants Blayne L. Hirsche, M.D. ("Dr. Hirsche") and C. Joseph Glenn, M.D. ("Dr. Glenn") (collectively "Defendants"), hereby move the Court for an order dismissing without prejudice plaintiff's Complaint and legal action. The basis for this motion is that plaintiff's legal

action, if she ever has one, has not accrued under the legal doctrine established in Seale v. Gowans, 923 P.2d 1361 (Utah 1996).

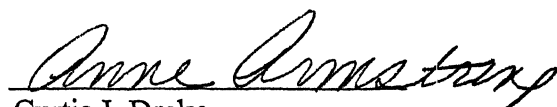
Plaintiff's complaint against Defendants includes allegations of negligence in failing to timely diagnose her breast cancer. Plaintiff further alleges that, as a result of the alleged delay in diagnosis, the likelihood of a recurrence is greater and her prognosis is therefore worse than would have been the case with an earlier diagnosis. Under the holding of Seale, supra, however, unless there is a recurrence of cancer, no legally cognizable injury exists and no cause of action has arisen. Plaintiff has not suffered a recurrence of cancer. Plaintiff's cause of action therefore, has not accrued and the Complaint should be dismissed. This motion is supported by a legal memorandum submitted contemporaneously herewith.

DATED this 30 day of July, 2002.

WILLIAMS & HUNT


Dennis C. Ferguson
Attorneys for Defendant
Blayne L. Hirsche, M.D.

SNELL & WILMER


Curtis J. Drake
Anne D. Armstrong
Attorneys for Defendant
C. Joseph Glenn, M.D.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, first-class,
postage prepaid, on the 30 day of July, 2002 to the following:

Michael F. Richman, Esq.
James W. Gilson, Esq.
MICHAEL F. RICHMAN & ASSOCIATES
5664 South Green Street
Murray, Utah 84123
Attorneys for Plaintiffs

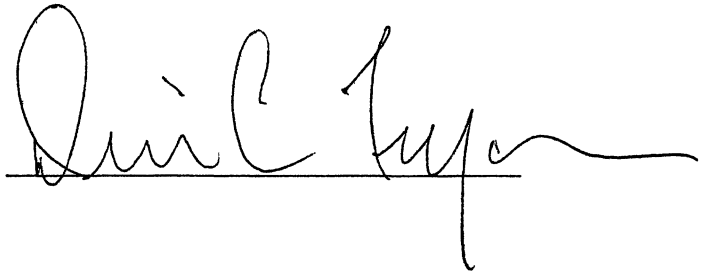
A handwritten signature in cursive script, appearing to read "Jim Gilson", written over a horizontal line.

Exhibit C

4TH DISTRICT COURT
PROVO DEPARTMENT
2002 AUG 14 P 2:58
6

Michael F. Richman [#4180]
James W. Gilson [#1170]
SIEGFRIED & JENSEN
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Attorneys for Plaintiff

**IN THE FOURTH JUDICIAL DISTRICT COURT
FOR UTAH COUNTY, STATE OF UTAH**

JAMIE MEDVED,

Plaintiff,

vs.

**C. JOSEPH GLENN, M.D. AND BLAYNE
L. HIRSCH, M.D.**

Defendants.

)
) **PLAINTIFF'S RESPONSE TO**
) **DEFENDANTS' JOINT MOTION**
) **FOR DISMISSAL WITHOUT**
) **PREJUDICE**

)
) **Case No.: 010400960**
) **Division: 9**

)
) **Judge: Fred D. Howard**

INTRODUCTION

Plaintiff, Jamie Medved by and through her counsel of record, hereby submit the following in response and opposition to Defendants' Joint Motion for Dismissal Without Prejudice.

Defendants' motion should be denied because Plaintiff has pled that she sustained actual damages as a result of Defendants' failure to timely diagnose her cancer. Specifically, plaintiff's Complaint alleges actual damages in conjunction with an increased risk of recurrence of cancer. She has, therefore, stated a claim upon which relief can be granted under Utah law. *George v.*

LDS Hospital 797 P.2d 1117 (Utah App. 1990) (“Liability may be found where negligence increases a party’s risk of harm.”) Restatement (Second) of Torts § 323) *Seale v. Gowans* 923 P.2d 1361 (Utah 1996) (“Actual damages in conjunction with the cancer’s recurrence” is a cognizable claim.)

DEFENDANTS’ MOTION TO DISMISS

Plaintiff’s Complaint alleges that Defendant’s negligently delayed diagnosis of her cancer and as a result, Plaintiff (a) sustained actual damages by undergoing more extensive treatment and surgery, including a radical mastectomy and (b) has an increased risk of recurrence. Defendants’ move to dismiss Plaintiff’s Complaint on the grounds that unless there is a recurrence of cancer, Plaintiff has not sustained a legally cognizable injury. Since Plaintiff has not had a recurrence, Defendants contend that Plaintiff’s Complaint should be dismissed. (Defendants’ Memorandum in Support Of Motion to Dismiss at p.2.)

PLAINTIFF’S RESPONSE AND OPPOSITION

Utah has recognized that liability may be imposed where negligence increases a party’s risk of harm in *George v. LDS Hospital* 797 P.2d 1117 (Utah App. 1990). In *Seale v. Gowans* 923 P.2d 1361 (Utah 1996), that right was limited to cases where the increased risk of harm is accompanied by actual damages.

Plaintiff alleged in her Complaint, (which under a motion to dismiss are deemed to be true), that she sustained actual damages as well as an increased risk of recurrence. Plaintiff has therefore stated a claim upon which relief can be granted.

I. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED BECAUSE PLAINTIFF HAS PLED THAT AS A RESULT OF DEFENDANTS' DELAY IN DIAGNOSIS, SHE SUSTAINED ACTUAL DAMAGES AND HAS AN INCREASED RISK OF CANCER RECURRENCE.

A. In A Motion To Dismiss, All Of Plaintiff's Allegations In Her Complaint Are Deemed To Be True. On a Motion to Dismiss Plaintiff's Complaint under 12(b)(6), of the Utah Rules of Civil Procedure, the Complaint is entitled to the benefit of not only all allegations in the Complaint, but also from the inferences in the light most favorable to Plaintiff. *Ellis v. Social Services of Church of Jesus Christ of Latter-Day-Saints* 615 P.2d 1250 (Utah 1980), *Mounteer v. Utah Power & Light Co.* 823 P.2d 1055 (Utah 1991). The allegations in Plaintiff's Complaint are deemed to be true. *Brown v. Weis* 871 P.2d 552 (Utah 1994).

B. Plaintiff Has Pled That She Sustained Actual Damages And Has An Increased Risk of Recurrence of Cancer As A Result of Defendants' Delay In Diagnosis.

Plaintiff's Complaint alleges that as a result of Defendants' delay in diagnosis that:

13. On December 16, 1998, the biopsies were carried out by Dr. Hirsche. These revealed infiltrating ductile carcinoma at all three sites. In late December of 1998, Ms. Medved underwent a right mastectomy. Since the tumor involved eight lymph nodes, it was also necessary to have the lymph nodes removed. She also underwent chemotherapy and radiation therapy after the surgery.

* * *

17. As a proximate result of the above-described negligence of Dr. Glenn, Jamie Medved's diagnosis of her breast cancer was delayed resulting in her having to undergo a mastectomy and axillary node dissection, intensive chemotherapy and radiation therapy and she remains at a very high risk of recurrence, has endured pain and suffering, disfigurement, loss of enjoyment of life and, other general damages in an amount to be proven at trial.

18. As a proximate result of the above-described negligence of Dr. Glenn, Plaintiff has incurred medical expenses, and, will undoubtedly incur future medical expenses and, other special damages including, but not limited to loss of income and loss of economic opportunities, in an amount to be proven at trial.

See also, paragraphs 22 and 23.

Defendants' statement of facts in their motion are unsupported by affidavit or deposition and should be stricken. The only "facts" before the court on this motion are the allegations of Plaintiff's Complaint which are assumed to be true and are entitled to all reasonable inferences to the benefit of the Plaintiff. The sole issue is whether those allegations, assumed to be true, state a claim upon which relief can be granted.

Since the allegations of Plaintiff's Complaint are deemed to be true, the issue is whether the Defendants' failure to timely diagnose breast cancer which results in a right radical mastectomy and produces an increased risk of the recurrence of cancer, states a claim for relief under Utah law.

C. Actual Damages In Conjunction With An Increased Risk of Cancer Recurrence Is Sufficient To Sustain A Claim For Negligence. In addition to actual damages, (radical mastectomy), Plaintiff has alleged that she has an increased risk of recurrence of cancer. In *George v. LDS Hospital* 797 P.2d 1117 (Utah App. 1990), the court recognized a claim for loss of chance. It cited with approval *James v. United States* 483 F.Supp. 581, 585 (N.D.C.A. 1980):

"Evidence which shows a reasonable certainty that negligent delay in diagnosis or treatment increased or lessened the effectiveness of treatment is sufficient to establish proximate cause." *Id.* at 585.

The Court also approved *Hicks v. United States* 368 F.2d 626 (4th Cir. 1966) and its conclusion that Defendant's "negligence nullified whatever chance of recovery she might have had and was the proximate cause of the death." *Id.* at 633. The court in *George, supra*, similarly cited with approval *Goff v. Doctors General Hospital of San Jose* 333 P.2d 29 (Cal. 1958) (where the "chance of saving a patient's life would have been increased if a physician had been timely notified" and whether this negligence was a cause of death was a jury question.) *Hamil v. Bashline* 392 A.2d 1280 (P. 1978) and the Restatement (Second) of Torts § 323¹

In *George*, the Plaintiffs brought a wrongful death action against the hospital. Following a jury verdict in favor of the hospital, the Supreme Court reversed for new trial. The Court found that a jury could have reasonably concluded that the hospital's negligence prevented doctors from treating and possibly saving patients' life but that the jury instructions prevented it from meaningfully considering the expert testimony.

Under *George v. LDS Hospital, supra*, then, a party is subject to liability if his negligent conduct increases the risk of harm, lessens the effectiveness of treatment or decreases a chance of survival. *Id.* at 1117.

In *Seale v. Gowans*, 923 P.2d 1361 (Utah 1996), the Utah Supreme Court conditioned that right of recovery to cases where the Plaintiff presents proof of actual damages. It did not abolish the claim for enhanced risk or overturn the ruling in *George v. LDS Hospital, supra*. Defendants cite, out of context, the following language from *Seale*: ...[A]n alleged claim for

¹"One who undertakes...to render services to another...is subject to liability...if (a) his failure to exercise [reasonable] care increases the risk of such harm."

enhanced risk is not adequate to sustain a cause of action for negligence.” (Defendants’

Memorandum in Support at p.4.) The complete quotation is, in fact:

Although we agree that the cancers spread resulted in a dramatic decrease in Ms. Seale’s chance of survival, we concluded that without proof of actual damages, an alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence. (Emphasis added.)

The Court discussed *Colbert v. Georgetown Univ.* 641 A.2d 469 (D.C. 1994), and *Swain v. Curry* 595 So.2d 168 (Dist. Ct. App. 1992), where risk of recurrence of cancer was approved, as a basis of liability. The Utah Supreme Court found that:

In these cases [*Colbert* and *Swain*] the evidence showed that the Plaintiffs had suffered actual damages in conjunction with the increased risk of the cancers recurrence.” *Id.* at 1366.

The Court distinguished those cases from Ms. Seale’s who did not allege she had actual damages as a result of the delay in diagnosis. Seale had a mastectomy and more extensive surgery in 1988, but did not sue until 1991. She did not allege the 1988 actual damages (mastectomy) in her 1991 suit because she was barred by the statute of limitations from such assertion. She, therefore, sued only for the risk of recurrence of cancer.

The issue in *Seale* was whether that claim was barred by the statute of limitations. Ms. Seale went to Dr. Gowans for a mammogram in August 1987. Dr. Gowans failed to detect a cancerous mass in Ms. Seale’s breast. The mass was not discovered until May, 1988. Ms. Seale had a radical mastectomy a short time later. The pathology report of the removed tissue showed that the cancer had spread to eight of Ms. Seale’s twenty lymph nodes. Although Ms. Seale was told that the finding of cancer in her lymph nodes increases the possibility that cancer would

recur in other parts of her body, Ms. Seale did not bring an action against Dr. Gowans at that time.

Ms. Seale tested negative for cancer until August 1991, when a bone scan showed cancer in her hip. Ms. Seale then brought an action against Dr. Gowans for negligent delay in diagnosing her cancer. Based on the jury's finding that Ms. Seale discovered or should have discovered her injury in June 1988, when she was correctly diagnosed with breast cancer, the trial court held that Ms. Seale's action was barred by the medical malpractice act's two-year statute of limitations, Utah Code Ann. § 78-14-4. The Utah Supreme Court reversed, holding that, under the particular facts of the case, the statute of limitations did not begin to run until the cancer returned in Ms. Seale's hip.

Dr. Gowans argued that the injury that triggered the running of the statute of limitations was the cancer's spread to Ms. Seale's lymph nodes, "which statistically increased the chance that cancer would recur and thus decreased her chance of long-term survival." 923 P.2d at 1364 (footnote omitted). The court held that "damages in the form of an enhanced risk *only* are not sufficient to start the running of the statute of limitations." *Id.* at 1365 (emphasis added). The court noted the general rule that, until a plaintiff suffers "actual harm or damages, the limitations period will not accrue." *Id.* at 1364. The court emphasized that the defendant had the burden of proving that the plaintiff had suffered some "actual harm or damages" before August 1989 and concluded that the defendant had not met his burden:

[D]efendants failed to prove that Ms. Seale suffered a legally cognizable injury when she discovered that the cancer had spread to her lymph nodes. The only evidence that defendants produced

regarding the harmful consequence of the cancer's spread was that it increased the risk that the cancer would recur. *They failed to argue or produce evidence that in 1988, Ms. Seale could complain of any actual present damages.* Although we agree that the cancer's spread resulted in a dramatic decrease in Ms. Seale's chance of survival, we conclude that *without proof of actual damages*, an alleged claim for enhanced risk is not adequate to sustain a cause of action for negligence. ...

...

Because the only evidence defendants presented at trial, and the only evidence Ms. Seale could marshal, showed that Ms. Seale could not have discovered any legally cognizable injury until 1991, we find that the evidence was insufficient for a jury to find that Ms. Seale discovered her injury in 1988.

Id. at 1364-65, 1366 (emphasis added).

In other words, the holding in *Seale* was based upon the parties' arguments and the evidence at trial that the only injury Ms. Seale suffered as a result of Dr. Gowans' negligence before her cancer recurred in 1991 was the possibility that her cancer would recur. The court found this a legally insufficient injury, absent some "actual harm or damages." *See Id.* at 1364. *See also Id.* ("once *some harm* is manifest, the limitations period begins to run on all claims") (emphasis added and citation omitted).

The Court did not rule or hold that Ms. Seale could not have sued in 1988 for actual damages or that she could not recover for enhanced risk or loss of chance. The Court *only* held that without actual damages, which were not alleged or sought, she could not have filed suit in 1988 for loss of chance.

By contrast, Mrs. Medved has alleged “actual harm or damages” resulting from Defendants’ negligence, as well as the enhanced risk that her cancer will recur. As previously discussed, those allegations are assumed to be true in a Motion to Dismiss. Specifically, Mrs. Medved has alleged that, but for Defendants’ negligence, she would not have required a modified radical mastectomy, and she would not have undergone the cost of more extensive therapy, which caused her pain, suffering and inconvenience.

II. TO THE EXTENT DEFENDANTS’ MOTION IS DEEMED A MOTION FOR SUMMARY JUDGMENT, IT SHOULD ALSO BE DENIED.

Summary judgment is appropriate only if the undisputed material facts demonstrate that the moving party is entitled to judgment as a matter of law. *Territorial Sav. & Loan v. Baird* 781 P.2d 452 (Utah 1989.) Since Defendants have not offered any affidavits, depositions, interrogatories or admissions, the pleadings are the only thing before the court. If Defendants’ Motion to Dismiss is considered a Motion for Summary Judgment, (i.e., that as a matter of law, Plaintiff is not entitled to relief for her claim,) it should also be denied.

As a matter of law, Plaintiff has made a claim for relief which is legally cognizable.

Plaintiff’s Complaint alleges that as a result of Defendants’ delay in diagnosis, she underwent more extensive surgery and treatment and has an increased risk of recurrence of cancer.

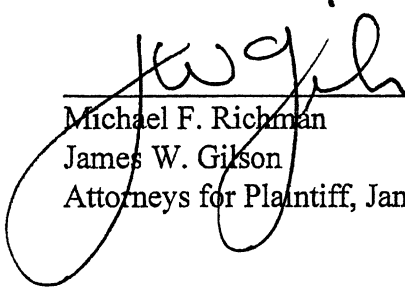
As discussed above, a Plaintiff who alleges she has sustained actual damages in conjunction with an increased risk of recurrence of cancer, has made a legally cognizable claim under Utah law. *George v. LDS Hospital, supra.*, and *Seale v. Gowans, supra.* As a matter of law, Plaintiff is entitled to relief for that claim.

CONCLUSION

Plaintiff's Complaint alleges that she sustained actual damages as a result of Defendants' delay in diagnosing her cancer. She is, therefore, entitled to all damages she has sustained, including all foreseeable consequences and those within reasonable medical certainty, caused by Defendants' negligence. Under Utah law, those consequences include the increased risk of harm caused by Defendants.

Dated this 12 day of August, 2002.

SIEGFRIED & JENSEN



Michael F. Richman

James W. Gilson

Attorneys for Plaintiff, Jamie Medved

CERTIFICATE OF MAILING

I, Cindy Disraeli, hereby certify that I have this 12th day of August, 2002, served the foregoing PLAINTIFF'S RESPONSES TO DEFENDANTS' JOINT MOTION FOR DISMISSAL WITHOUT PREJUDICE, to all interested parties to this matter by mailing a copy, regular mail, properly addressed and with postage prepaid, to:

Counsel for Defendant: C. Joseph Glenn, M.D.

Curtis J. Drake
Snell & Wilmer
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

Counsel for Defendant: Blayne L. Hirsche, M.D.

Dennis C. Ferguson
Williams & Hunt
257 East 200 South, Suite 500
Post Office Box 45678
Salt Lake City, UT 84145-5678


Cindy L. Disraeli

Exhibit D

SEP 13 3 33 PM '02

Defendants submit this Joint Reply Memorandum in support of their Motion to Dismiss Without Prejudice. Defendants seek dismissal of plaintiff's Complaint under the precedent established in Seale v. Gowans, 923 P.2d 1361 (Utah 1996), which holds that a plaintiff attempting to assert a claim for negligent delay in diagnosis of breast cancer does not have a cause of action unless or until she has a recurrence of cancer. In essence, Seale

holds that a plaintiff cannot assert a claim that her potential for developing a recurrence of cancer is greater, or her chance of surviving reduced, because of a delay in diagnosis so long as she remains cancer free. Seale holds that such a cause of action does not accrue until such time, if ever, as the cancer recurs.

There is no dispute in this case that plaintiff, despite her alleged delay in diagnosis, has not had a recurrence of cancer. In her opposition memorandum, plaintiff objects to the statement of facts set forth by defendants in their principal supporting memorandum and asserts that the Court must determine the merits of defendants' motion based solely upon the allegations of the Complaint. She argues that she has alleged in her complaint that had her cancer been diagnosed sooner, she would have received different and less invasive treatment and that she has, therefore, suffered actual damages. The statement of facts presented by defendants in the principal memorandum, do not call into dispute this allegation. While defendants have reason to dispute this assertion, they do not purport to do so in the context of this motion nor do they believe that it is relevant to the legal issue presented to the Court.

It also makes no difference whether this Court treats defendants' motion as a motion to dismiss pursuant to Rule 12(b)(6) or as a motion for summary judgment pursuant to Rule 56. The Court is entitled to consider evidence outside of the pleadings, if appropriate, regardless of how defendants' motion is styled. Rule 12(b)(6) makes specific allowance for the Court to consider evidence and simply treat a motion to dismiss as a motion for summary judgment. Frankly, the facts set forth in defendants' memorandum are so basic and so incontrovertible that defendants did not anticipate opposition to them. To ensure that the Court is able to place this case in proper context,

however, it is important to understand the basic sequence of medical facts. Therefore, defendants reassert the eleven statements of fact set forth in their principal memorandum, with citations to the record.

STATEMENT OF FACTS

1. Plaintiff first saw Dr. Glenn as a patient in 1991. (Plaintiff's deposition, p. 20; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

2. Plaintiff's last visit with Dr. Glenn was February 27, 1998. (Plaintiff's deposition, p. 112; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

3. During the time plaintiff was a patient of Dr. Glenn, she was diagnosed with fibrocystic breast disease. (Deposition of plaintiff, pp. 20, 90; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

4. Plaintiff first saw Dr. Hirsche as a patient on July 13, 1998. (Plaintiff's deposition, p. 40; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

5. A mammogram, ordered by Dr. Hirsche and performed on July 20, 1998, revealed dense fibroglandular tissue bilaterally, no significant abnormality and no evidence of malignancy. (Plaintiff's deposition, p. 19; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

6. On August 12, 1998, Dr. Hirsche performed bilateral breast augmentation and aspiration of three suspected right breast cysts. (Plaintiff's deposition, p. 43, see also, all medical records produced by plaintiff pursuant to Rule 26(a)).

7. On December 16, 1998, Dr. Hirsche performed an excisional biopsy of three right breast nodules. (Deposition of plaintiff, p. 52; plaintiff's Complaint, ¶ 13; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

8. The pathological examination associated with the December 16, 1998, excisional biopsy revealed the presence of differentiated infiltrating ductal carcinoma. (Plaintiff's deposition, p. 54; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

9. On December 28, 1998, Steven J. Mintz, M.D. performed a right modified radial mastectomy. (Plaintiff's deposition, p. 57; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

10. Plaintiff followed her surgical treatment with chemotherapy and radiation therapy and later had surgical reconstruction. (Plaintiff's deposition, pp. 57, 58, and 121; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

11. Plaintiff has not had a recurrence of her cancer. (Plaintiff's deposition, pp. 60-61; see also, medical records produced by plaintiff pursuant to Rule 26(a)).

ARGUMENT

POINT I

CONTRARY TO PLAINTIFF'S CONTENTIONS, UTAH LAW DOES NOT RECOGNIZE A LOSS OF CHANCE CAUSE OF ACTION

In opposition to the Motion to Dismiss, plaintiff contends that because her claim includes actual, present damages in conjunction with claims for damages associated with an increased risk of recurrence of cancer, she has stated a cognizable claim under Utah law. In support of this argument, plaintiff cites George v. LDS Hospital, 797 P.2d 1117 (Utah

Ct. App. 1990) and asserts that the George court recognized a claim for loss of chance. Plaintiff next argues that the Utah Supreme Court's decision in Seale merely limited the holding in George by requiring that a loss of chance claim be accompanied by a claim for actual and present damages. Contrary to plaintiff's contention, George did not recognize a claim for loss of chance.

In George, a hospitalized patient died as a result of a sepsis-induced cardiac arrest. The factual evidence presented at trial showed that hospital nurses were aware that the patient's condition was deteriorating for a period of four hours prior to the cardiac arrest, but failed to inform the patient's physicians of these signs and symptoms. The jury found that, although the nurses' failure to inform the physicians constituted negligence, it was not a proximate cause of the patient's death. On appeal, the plaintiff argued that jury instructions improperly implied that there could only be one proximate cause of injury, thereby preventing the jury from finding that the nurse's failure to act was a contributing and proximate cause of the patient's death. The issue on appeal was one of negligence and proximate cause and whether a negligent act which merely contributes to injury, but is not the sole cause of injury, constitutes proximate cause. The Utah Court of Appeals, finding that a jury could have reasonably concluded that the nurses' failure to notify physicians of the patient's deteriorating condition was a proximate cause of her death, reversed and remanded for a new trial. In its analysis, the George court found that the facts presented at trial supported the plaintiff's position that the nurses' negligence was a contributing cause of the patient's death. In so doing, the court explained that, if the nurses had notified physicians of the patient's symptoms, they may have taken measures to treat the sepsis before the patient arrested. Their failure to act therefore, operated to reduce the

patient's chances for recovery. It is this characterization of the mechanism of causation which is sometimes erroneously interpreted as establishing a loss of chance cause of action. In George however, reduced chance of recovery and increased risk of harm are descriptions of the contributing cause of injury not of the injury itself. The injury was death. Plaintiff here seeks to establish that a decreased chance of recovery is itself an injury. The holding in George simply does not support plaintiff's argument.

In Anderson v Brigham Young University, 879 F. Supp. 1124 (D. Utah 1995), the United States District Court had occasion to interpret George when it was presented in essentially the same manner as plaintiff attempts to use it here. Andersen, a diversity action, involved a medical malpractice claim brought by a BYU student against the BYU McDonald Health Center. The plaintiff alleged that physicians at the health center failed to timely diagnose his Hodgkin' Disease. He sought recovery for a reduced chance of survival and intentional infliction of emotional distress. Finding that Utah law does not recognize a loss of chance cause of action, the court granted BYU's motion for summary judgment on the claim for reduced chance for survival. In so doing the court addressed George, which was cited by Andersen, and explained that it does not recognize a cause of action for loss of chance.

The [George] court cited Hicks and other loss of chance cases for the proposition that where the chances of saving a life would be increased absent negligence or malpractice, a jury could find such negligence or malpractice to be a proximate cause of subsequent injury or death. George is distinguishable from the facts in this case, however. In George, there was an actual injury suffered because the patient died. *George does not purport to recognize or create a new cause of action for mere reduction of statistical chances for survival.*

Anderson, 879 F. Supp. at 1129. (Emphasis added.)

Plaintiff here also seeks recovery for a reduced chance of survival. As the Andersen court explains however, the holding in George does not support such a claim. In George, language regarding increased risk of harm and reduced chance of recovery is used to describe a proximate cause of injury, not an injury in and of itself. While not binding on this Court, the Andersen opinion provides a well-reasoned explanation of the Utah Court of Appeals holding in George. In addition, Andersen provides an accurate description of the status of Utah law with respect to the loss of chance doctrine. “This Court is satisfied that Utah has not adopted a separate cause of action permitting recovery for the reduction of a statistical chance of long-term survival.” Andersen 879 F. Supp. at 1130.

It is Seale and not George which, in circumstances almost identical to the instant case, addressed the issue of whether Utah law permits recovery for a reduced chance of survival. The Seale Court decided the issue by finding that Ms. Seale did not have an actionable claim until the recurrence of her disease. “Ms. Seale could not have discovered any legally cognizable injury until 1991 [when she was diagnosed with a recurrence of cancer].” Seale 923 P.2d at 1366.

POINT II

PLAINTIFF FAILS TO DISTINGUISH HER INJURIES FROM THOSE HELD TO BE LEGALLY INSUFFICIENT IN SEALE v. GOWANS.

The only facts necessary for the Court’s determination of defendants’ motion are (1) plaintiff is attempting to assert a claim for alleged negligent delay in diagnosis of breast cancer; and (2) since her treatment for the cancer she has had no recurrence. These facts alone not only support, but mandate a motion to dismiss in favor of the defendants. The

question before the Court is purely a question of law turning on the interpretation of the Utah Supreme Court's ruling in Seale v. Gowans, 923 P.2d 1361 (Utah 1996).

The essence of Seale is that no claim can be brought for a delay or failure to diagnose cancer, until such time as the cancer recurs. It is that simple:

As a result, even though there exists a possibility, even a probability, of future harm, it is not enough to sustain a claim, and a plaintiff must wait until some harm manifests itself.

Seale, 923 P.2d at 1364.

[W]e find that defendants failed to prove that Ms. Seale suffered a legally cognizable injury when she discovered that the cancer had spread to her lymph nodes.

Id.

As discussed hereafter, if Ms Seale's cancer had not recurred, she could not have recovered for an enhanced risk of the cancer's recurrence.

Id. at 1366, n.2.

Plaintiff's opposition to the Motion to Dismiss is entirely based on an unsuccessful attempt to distinguish this case from Seale v. Gowans. Plaintiff claims that her case is unlike Seale in that Mrs. Medved has suffered actual present damages in the form of more extensive surgery which would not have been necessary if the defendants had diagnosed her cancer earlier.

Plaintiff's attempt to distinguish this case from Seale is, however, without basis. In fact, Ms. Seale had similar "actual" damages when she received the correct diagnosis and subsequent treatment more than two years prior to commencement of her lawsuit. In May 1988, approximately one year after Dr. Gowans's alleged failure to detect the breast cancer, Ms. Seale obtained a correct diagnosis and underwent a radical mastectomy,

followed by radiation and hormone treatment. At the time of the surgery, it was also discovered that she had developed a second malignant tumor and the cancer had spread to eight of her lymph nodes. Seale, 923 P.2d at 1362.

In the present case, Mrs. Medved also had positive lymph nodes by the time her cancer was diagnosed. In Seale, the Court noted evidence that “women who have small tumors with no positive nodes have a long-term survival rate in excess of 85, 90 percent. When the nodes are involved, it drops significantly, to slightly under 50 percent and the more lymph nodes that are involved, the higher the probabilities are that we’re dealing with systemic disease.” Seale, at 1366, n.6. Plaintiff’s situation is not different from Ms. Seale’s in any material respect.

The “actual” injuries alleged by Mrs. Medved are legally no different in nature than those actual injuries suffered by Ms. Seale. Both women presented evidence that they had undergone more extensive surgery and/or therapy than they would have had if the cancer had been diagnosed earlier by the defendants’ physician.

In Seale, the very same argument now made by Mrs. Medved was, in fact, presented to the Utah Supreme Court and rejected. Dr. Gowans argued in his Petition for Rehearing that the record demonstrated that Ms. Seale had not only knowledge of injury in the form of an increased risk of recurrence of cancer, but she also had knowledge of “actual present damage” in the form of past radiation and hormone therapy -- “additional treatment that would not have been necessary had the cancer been detected earlier.” See Petition pp. 2-7, attached hereto as Ex. “A”. See Order, attached hereto as Ex. “B”. The Supreme Court rejected this argument, denying the Petition For Rehearing on October 2, 1996. The Utah Supreme Court plainly did not consider such damages sufficient to

support a claim in a case for failed or delayed diagnosis of cancer. This is because of the basic policy premise of the Seale opinion.

Because there is no question that the same argument and facts were presented to the Supreme Court in Seale, this Court is constrained to follow the controlling law and outcome in that case. It is plainly the most recent controlling law directly on the issue before this Court.

POINT III

SEALE REQUIRES THAT ALL PLAINTIFF'S CLAIMS ARE PRESERVED AND MAY BE ASSERTED ONLY AT SUCH TIME AS THERE IS A RECURRENCE OF CANCER.

The essence of plaintiff's argument is that Seale suggests that the one action rule allows her to maintain her claim for damages based on enhanced risk of future cancer as long as she can identify any type of present injury, such as having received more extensive treatment. This argument turns Seale on its head, again ignoring both the underlying facts in Seale and the basic premise of the Court's opinion.

The Supreme Court in Seale did state that the one action rule precludes splitting causes of action and the filing of multiple lawsuits arising out of the same alleged wrongful act. What plaintiff misses is the fact that the Court made a policy-based decision that the one action rule should be applied to avoid the assertion of speculative claims and to preserve all claims until such time as there is a recurrence of cancer. Only by such a ruling could the Court assure that plaintiffs would not be forced to file premature lawsuits on the chance of a recurrence of cancer, while still protecting plaintiffs from the argument that awareness of speculative or minor injury would start the statute running and preclude a

later claim when the recurrence manifested in real and substantial injury. The Court noted:

[M]any of these plaintiffs will be unable to produce the necessary evidence to show that the future harm is more likely to occur than not. Yet, if the harm, such as the recurrence of cancer, later occurs, the plaintiff would be precluded from any recovery for devastating injuries by reason of having acquired an earlier claim for purely speculative ones. We believe that the better approach is to wait until the potential harm manifests itself, allowing for more certain proof and fewer speculative lawsuits.

Seale, at 1366.

Seale poses problems for both plaintiffs and defendants in cancer diagnosis cases. A plaintiff might argue that it is unfair to prevent her from a present recovery of existing damages for having undergone more extensive surgery or cancer treatment. She is, however, insulated from the running of the statute of limitations and assured that she will not be without a remedy if the worst (recurrence of the cancer) occurs in the future. In short, premature and relatively minor damage cases are precluded (or delayed) in favor of preserving full rights to a remedy for the devastating and non-speculative damage cases. A defendant physician might argue that the effect of Seale is unfair because it prevents the running of the statute of limitations indefinitely, even where the plaintiff is aware of a misdiagnosis. The physician, however, is protected by Seale from speculative claims and multiple lawsuits arising from the same treatment. The Utah Supreme Court balanced these different interests Seale and made a sound decision that there shall be only one cause of action in these cases and it will not accrue until such time as there is a recurrence of the cancer. Plaintiff may not like this outcome now, but it affords her future protection in the event the worst happens, and it is the controlling law in this State.

Plaintiff mistakenly relies on Swain v. Curry, 595 So.2d 168 (Fla. 1992). The defendants, who did not prevail in Seale, also cited Swain in support of their argument. The Supreme Court, expressly declined to follow Swain and rejected defendants' argument. Swain was distinguishable not only on the facts, but also on the law. An important consideration in Swain was the Florida statute of limitations for medical malpractice claims, which commences to run when a patient knows of either a breach of the standard of care or a physical injury. Swain, at 171 and n.4. Thus, in Swain the Florida court had to be concerned with the possibility of the statute of limitations running to preclude a misdiagnosis case even where there was no injury.¹ The Court solved the problem by allowing the patient to proceed with a claim for possible recurrence of cancer. In Utah, the state Supreme Court is faced with a different statute of limitations standard which requires knowledge of both the physical injury and the possibility that it was caused by medical negligence before the statute will commence to run.² The Utah Supreme Court has thus been able to protect plaintiffs in delayed diagnosis of cancer cases by ruling that, until there is a recurrence, there is no injury and the statute will not run.

Most importantly, the Utah Supreme Court has addressed the problem of the statute of limitations and the one action rule in a way that provides far more protection to

¹ In Seale, the Court also took note of another Florida case, Johnson v. Mullee, 385 So.2d 1038 (Fla. 1980). In that case, however, the Florida Court of Appeal found under similar circumstances that the plaintiff had no cause of action until there was a recurrence or metastatic spread of the cancer. Notably, Johnson was decided under an earlier version of Florida's statute of limitations, one which was different from that considered in Swain.

² In Utah, the two-year period for bringing a medical negligence claim "does not start to run until the injured person knew or should have known that he had sustained an injury and that the injury was caused by negligence." Seale, at 1363 (citing Foil v. Ballinger, 601 P.2d 144, 148 (Utah 1979).)

plaintiffs who ultimately suffer a recurrence, than the Florida Court did in Swain. Rather than forcing plaintiffs into premature speculative lawsuits, losing the right to file an action upon discovery of the ultimate injury, the Utah Supreme Court has, under its statute of limitations, extended to plaintiffs the opportunity in every such case to wait and obtain full compensation for the ultimate devastating injury. Seale v. Gowans is the controlling law in this case and, as noted above, the facts are indistinguishable. Only one claim may be brought for injuries arising from the alleged the delayed diagnosis of cancer, and regardless of the existence of some actual injury in the form of more extensive therapy, the claim cannot be brought until such time as there is a recurrence of cancer. In the meantime, the plaintiff is protected, for the statute of limitations will not run.

CONCLUSION

Fortunately, Mrs. Medved has been in remission since completion of her therapy. Although there is a statistical possibility or even probability of recurrence, that is insufficient to sustain a claim. Plaintiff has failed to present any admissible evidence of a legally cognizable present injury under Seale.

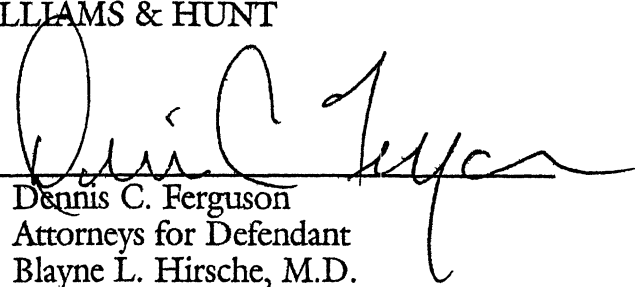
If this Court grants defendants' motion to dismiss for the reason that no actionable claim presently exists, plaintiff will have lost little. If she does suffer a future recurrence, she will retain the right to file a claim for full recovery at that time. Only if this Court declines to follow Seale by refusing to grant a motion to dismiss, will plaintiff lose the right to file a claim if her cancer ever recurs.

For the foregoing reasons, defendants respectfully request that the Court grant their motion to dismiss.

DATED this 10 day of September, 2002.


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**IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR
UTAH COUNTY, STATE OF UTAH**

JAMIE MEDVED,

Plaintiff,

v.

C. JOSEPH GLENN, M.D., and BLAYNE
L. HIRSCH, M.D.,

Defendants.

CERTIFICATE OF SERVICE

Case No. 010400960


Judge Fred D. Howard

I hereby certify that on this 10th day of September, 2002 I caused a true and correct copy
of the **JOINT REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION
FOR DISMISSAL WITHOUT PREJUDICE** to be mailed, postage pre-paid, to the following:

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IN THE SUPREME COURT FOR THE STATE OF UTAH

JOHN SEALE, personal representative
of the Estate of Beverly Seale.

Plaintiff-Appellant.

vs.

DON F. GOWANS, M.D., and HOLY
CROSS HOSPITAL, dba HOLY CROSS
BREAST CARE CENTER,

Defendants-Appellees.

No. 940599

Priority No. 15

**PETITION FOR REHEARING
OF APPELLEE DON F. GOWANS, M.D.**

**APPEAL FROM JURY VERDICT OF THE THIRD JUDICIAL
DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH.
THE HONORABLE RONALD O. HYDE, PRESIDING**

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INTRODUCTION

Plaintiff-Appellant, Beverly Seale ("Ms. Seale") commenced this action alleging medical negligence on the part of Don F. Gowans ("Dr. Gowans") for failure to detect Ms. Seale's breast cancer approximately one year prior to its diagnosis in May 1988. The trial court denied Dr. Gowans' Motion for Summary Judgment on his statute of limitation defense on grounds that it was a question of fact for the jury as to when the statute of limitation began to run. The jury concluded the statute of limitation began to run in June, 1988, thus rendering Ms. Seale's action time barred--it not having been commenced until more than two years after June, 1988.

Ms. Seale appealed the trial court's denial of her Motion for JNOV. On August 2, 1996, this Court filed its opinion reversing the denial of Ms. Seale's Motion for JNOV on grounds that there was insufficient evidence to uphold the jury's verdict. Seale v. Gowans, No. 940599, slip op. (Utah, filed August 2, 1996). (A copy of the Court's August 2, 1996 opinion is attached hereto as Addendum A.)

ISSUE ON PETITION FOR REHEARING

Dr. Gowans seeks rehearing on the Court's conclusion that defendants presented no evidence that in June, 1988 Ms. Seale could complain of actual present damage necessary to trigger the running of the statute of limitation. Grounds for the petition are that substantial evidence in the record establishes that in June, 1988 Ms. Seale knew or should have known that the spread of her cancer to her lymphatic system and its "spreading" or

"invasive" character in the breast caused additional treatment that would not have been necessary had the cancer been detected earlier.¹ (The pages from the Trial Transcript containing this evidence are attached as Addendum B.)

ARGUMENT

THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD THAT MS. SEALE KNEW OF SHOULD HAVE KNOWN IN JUNE 1988 THAT DR. GOWANS' ALLEGED NEGLIGENCE CAUSED DAMAGE IN THE FORM OF ADDITIONAL MEDICAL TREATMENT

A. Factual Background

In August, 1987, Ms. Seale had a mammogram done at Holy Cross Hospital Breast Care Center ("Holy Cross") which was interpreted as normal by Dr. Gowans. In May, 1988, Ms. Seale had another mammogram done at Holy Cross which was interpreted as being suspicious of cancer. That same day, a needle biopsy confirmed that Ms. Seale had breast cancer.

On June 1, 1988, Ms. Seale underwent surgery which included the removal of breast tissue and lymph node tissue under the arm. The pathology report on tissue submitted for analysis following surgery showed the cancer had spread throughout the breast and away from the breast to the lymphatic system. A second tumor was also diagnosed which had not been previously detected. As a consequence of the delayed diagnosis of her cancer, its

¹Dr. Gowans does not seek rehearing on the Court's legal conclusion that damages in the form of enhanced risk only are insufficient to start the running of the statute of limitation.

"spreading" or "invasive" character in the breast and the spread to the lymphatic system . Ms. Seale was required to undergo additional treatment-radiation therapy and hormonal therapy. This constitutes damage.

Dr. Gowans claimed, and the jury concluded, that by June, 1988, Ms. Seale knew or should have known of Dr. Gowans' alleged negligent failure to diagnose her cancer and that this delay caused her damage--triggering the running of the statute of limitation.

On appeal this Court found there was sufficient evidence to show that in 1988 Ms. Seale knew or should have known that Dr. Gowans had negligently failed to diagnose her cancer in 1987 and that in 1988 Ms. Seale knew her cancer had spread to her lymph nodes. The court found also that the spread of Ms. Seale's cancer decreased the chance of her survival and increased the probability the cancer had spread to other areas of her body. Seale v. Gowans, No. 940599, slip op at 2, 5-7. The record is replete with evidence that by June 1988 Ms. Seale was aware of all this information. (R. 1052-1054, 1069-1070, 1090, 1097-1098, 1106, 1061-1063, 1086-1087, 1090.)

However, the Court held that the fact that the spread of Ms. Seale's cancer decreased her chance of survival to below 50 percent and increased the probability the cancer had spread to other areas of the body did not constitute a legally cognizable injury to trigger the running of the statute of limitation. The rule adopted by the Court is that without proof of actual damages, a claim for enhanced risk is not adequate to sustain a cause of action for negligence. Seale v. Gowans, No. 940599, slip op at 7. The Court made clear, however, that

"once some harm is manifest, the limitations period begins to run on all claims, present and future." *Id.* at 6.

In concluding there was insufficient evidence to sustain the jury's verdict, the Court found that defendants failed to produce evidence that Ms. Seale suffered any actual present damage because of the cancer's spread to her lymphatic system. Gowans v. Seale, No. 940599, slip op at 6-7. However, there is substantial evidence in the record that Ms. Seale suffered actual present damages in June, 1988. Plaintiff had the obligation to marshal this evidence and failed to do so. Hansen v. Stewart, 761 P.2d 14, 17 (Utah 1988). The evidence is that in June, 1988, Ms. Seale knew or should have known that her cancer had an "invasive" or "spreading" nature in the breast and had spread to her lymphatic system and that because of this, she would need additional and more extensive treatment than would have been necessary had the cancer been diagnosed before the spread.

Set forth below is the substantial evidence supporting the verdict that Ms. Seale knew or should have known in June, 1988 that she suffered actual present damage.

A possible explanation for the Court overlooking the evidence that by June, 1988, Ms. Seale had suffered actual damage is the Court's apparent belief that "[d]efendants" contend that the evidence produced at trial shows that in May, 1988, Ms. Seale had discovered or should have discovered both Dr. Gowans' negligence in failing to detect her cancer and the injury that resulted from that negligence." Seale v. Gowans at 5. However, it has never been Dr. Gowans' contention that in May, 1988 Seale had discovered injury resulting from negligence. Dr. Gowans has always argued that by June, 1988, after the diagnosis of the spread of Ms. Seale's cancer to her lymphatic system, and the cancer's invasive nature, which necessitated additional treatment, Ms. Seale knew or should have known of her legal injury.

Dr. Hogle testified that the type and scope of treatment to be employed in treating breast cancer depends upon whether the cancer is localized to the breast, regional--involved in the breast and lymph nodes, or systemic--meaning the cancer has gone beyond the breast and lymph nodes to the bones, lungs, or someplace else in the body. (R. 1048-1049, 1074-1075.) Dr. Hogle met with Ms. Seale on two occasions between May 27, 1988 and June 1, 1988 and discussed with her the biology of breast cancer and the treatment options used to treat it. (R. 1050-1059.) Ms. Seale testified that she knew as early as 1985 that delay in diagnosis of cancer had an effect on the treatment of cancer. (R. 1229.)

Dr. Hogle testified there are two different sets of treatment. The first set is what is referred to as "primary" therapy and involves a choice between two surgical procedures: (1) lumpectomy, called breast conservation therapy, or (2) modified radical mastectomy. Where, however, cancer is no longer localized, that is, has spread to the lymph nodes, then "secondary" treatment, frequently referred to as "adjuvant therapy" is necessary. Adjuvant therapy includes chemotherapy or hormonal treatments and on occasion radiation therapy in addition to the mastectomy.³ The adjuvant therapy becomes necessary because the spread to the lymphatic system creates a significant probability the cancer has spread to other areas of the body. (R. 1048-1049, 1061-1063, 1086-1087.)

In June, 1988, following surgery, Dr. Hogle told Ms. Seale her cancer had spread beyond the breast and into the lymphatic system and that the spread significantly

³Radiation therapy is usually employed as part of the lumpectomy or breast conservation primary therapy.

reduced her prognosis for a successful cure and increased the likelihood the cancer had spread to other areas of the body. (R. 1061-1063, 1086-1087, 1090.) Dr. Hogle testified that the finding in June, 1988 of the spread of Ms. Seale's cancer to her lymphatic system and its invasive nature caused the need for additional treatment--adjuvant therapy--and that in June, 1988, he informed Ms. Seale of this fact and recommended additional therapy. Dr. Hogle recommended radiation therapy and referred Ms. Seale to Dr. John Thompson for this therapy; also he recommended chemotherapy or hormonal therapy and referred her to Dr. James Cecil for this therapy. (R. 1059, 1062-1065, 1199-1201.) Dr. Hogle testified:

Q Did you, because of the findings at the time of surgery, including the spread to the lymphatic system and the invasive nature of the tumor, make some recommendations to Ms. Seale about additional cancer therapy that you felt would be appropriate to consider?

A Yes, sir, I did.

Q ...[You], told her that findings of the metastasis spread to the lymph nodes and of the invasive nature of the cancer within the breast itself?

A Yes, that it triggered the need for additional treatment.
(emphasis added)

(R. 1063-1064.) Consequently, Ms. Seale underwent daily radiation treatment for five to seven weeks and underwent hormonal therapy--the taking of tamoxifen at least once per day for more than three years. (R. 1110-1112, 1201-1203.)

Accordingly, the record establishes that in June, 1988, Ms. Seale knew or should have known:

- (1) that early diagnosis of cancer is better than late diagnosis;
- (2) that the delay in diagnosis of cancer increases the probability that cancer has spread and that such delay affects the treatment of cancer;
- (3) that Dr. Gowans failed to diagnose her cancer approximately one year before it was diagnosed;
- (4) that by the time the cancer was diagnosed in 1988 it had an "invasive" or "spreading" nature in the breast and had spread to her lymphatic system; and
- (5) that because of the nature of the cancer and its spread she had to undergo additional and more extensive treatment than would have been necessary had the cancer been diagnosed earlier.⁴

The additional treatment caused by the spread of Ms. Seale's cancer is actual present damage known to Ms. Seale which triggered the running of the statute of limitation in June, 1988.

B. Legal Application of Facts

The position of Dr. Gowans is supported by the case law cited by the Court in its decision. Swain v. Curry, 595 So. 2d 168 (Dist. Ct. App. 1992), review denied, 601 So. 2d 551 (Fla. 1992); Colbert v. Georgetown Univ., 641 A. 2d 469 (D.C. Cir. 1994) (en banc).

⁴The failure of Ms. Seale to "marshall" this evidence in support of the jury verdict is a substantial factor in it being overlooked by the Court in its opinion.

The Court incorrectly concluded these cases were distinguishable because the evidence therein showed the plaintiffs had suffered actual damage in conjunction with the increased risk of the cancer's reoccurrence. In light of the uncontradicted evidence in the record that Ms. Seale knew she was required to undergo more treatment than would have been required had the cancer been diagnosed before its spread, these cases are directly on point.

In Swain v. Curry, plaintiffs alleged Dr. Curry failed to detect Swain's breast cancer approximately one year before it was diagnosed by another physician. Swain argued the delay in diagnosis caused present damage even though at the time of the opinion Ms. Swain had no clinical evidence of recurrence of cancer. Plaintiffs argued, *inter alia*, that the delay in diagnosis affected treatment modalities for her cancer and that if the cancer had been diagnosed earlier she would not have received chemotherapy and would have undergone a lumpectomy with radiation as opposed to a mastectomy. Swain v. Curry, 595 So. 2d at 169-170.

In reversing summary judgment in favor of Dr. Curry, the Florida Court of Appeals held that Swain had presented evidence that her treatment and related damages would have been different had the cancer been diagnosed earlier. Therefore, Swain had a cause of action for additional physical damages as a result of the claimed delayed diagnosis against which the statute of limitation began to run. *Id.*

In Colbert v. Georgetown Univ., plaintiff alleged defendant physician negligently treated Susan Colbert's cancer. The Court of Appeals for the District of Columbia affirmed summary judgment in favor of defendant physician holding that Susan

Colbert sustained "appreciable and actual harm" sufficient to trigger the running of the statute of limitation when she sustained damages incident to treatment and therapy, such as radiation and chemotherapy, allegedly necessary because of the negligent treatment of her cancer. Colbert v. Georgetown Univ., 641 A. 2d at 473-475.

This Court's conclusion that the evidence showed that Ms. Seale could not have discovered any legally cognizable injury until 1991 when she discovered the cancer had spread to her hip is incorrect. The damage Ms. Seale became aware of in 1991 is the same damage she was aware of in June, 1988. What Ms. Seale knew in 1991 was that the cancer had spread to her hip which required additional radiation therapy and, consequently, damage resulted therefrom. What Ms. Seale knew in June, 1988 was that the cancer had an invasive component and had spread to her lymphatic system and that consequently she suffered damage in the form of radiation and hormonal treatment she would not have had to undergo had the cancer been diagnosed earlier.

Ms. Seale knew no more about whether the delayed diagnosis of her cancer caused her damage in 1991 than she knew in 1988. Dr. Hogle testified there is no way to tell precisely when Ms. Seale's cancer spread from her breast and into the vascular system which spread manifested itself in her hip in 1991. Dr. Hogle stated:

Q As we sit here today, is there any way to tell precisely in Ms. Seale's case when the cancer metastasized or spread from her breast into the vascular system and it's now shown up in her hip?

A No. There is not.

(R. 1068.) Ms. Seale acknowledged Dr. Hogle informed her that her cancerous tumor had been in her body for a minimum of ten years. (R. 1227.) The spread of Ms. Seale's cancer into her vascular system could have occurred prior to 1987 when Dr. Gowans failed to detect the cancer--there is simply no way to tell precisely when the spread occurred.

C. Statutes of Limitation

Finally, statutes of limitation are by design indiscriminant in their application and often harsh in their result. Whether this is wise or unwise, just or unjust is, admittedly, subject to debate--but not within this case. The two year statute of limitation in U.C.A. § 78-14-4 is the law to be applied. The trial court following case law from this Court concluded that when Ms. Seale knew or should have known of her legal injury was a question of fact. After being properly instructed on the applicable law,⁵ the jury having considered this evidence (and knowing the legal effect of their verdict) found that Ms. Seale knew or should have known of her legal injury in June, 1988. (R. 715; see Special Verdict Form attached hereto as Addendum C.) The trial court in denying Ms. Seale's JNOV motion held that "there is competent evidence sufficient to support the verdict." (R. 830-831.) Substantial and uncontradicted evidence supports this verdict and it should be affirmed.

CONCLUSION

This Court has overlooked the substantial and uncontradicted evidence which establishes that in June, 1988, Ms. Seale was aware of Dr. Gowans' alleged negligence and

⁵Seale v. Gowans, No. 940599, slip op at 4n5.

that this conduct caused her actual damage in the form of additional medical treatment in addition to the increased risk of future harm.

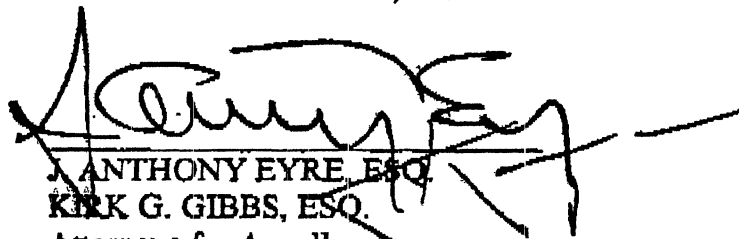
The Petition for Rehearing should be granted.

RULE 35(a) CERTIFICATION

Counsel for Petitioner, J. Anthony Eyre and Kirk G. Gibbs, certify that this Petition for Rehearing is presented in good faith and not for delay.

DATED THIS 16th day of August, 1996.

KIPP AND CHRISTIAN, P.C.



J. ANTHONY EYRE, ESQ.
KIRK G. GIBBS, ESQ.
Attorneys for Appellee
Don F. Gowans, M.D.

MAILING CERTIFICATE

I HEREBY CERTIFY that on the 6 day of August, 1996, I caused two true and correct copies of the foregoing **Petition for Rehearing of Appellee, Don F. Gowans, M.D.**, be mailed, postage prepaid, to the following:

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A handwritten signature in dark ink, appearing to be "D. W. Slagel", written over a horizontal line.

STATE OF UTAH
SALT LAKE CITY, UTAH

October 2, 1996

OFFICE OF THE CLERK

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Beverley Searle,
Plaintiff and Appellant,

v.

Don F. Gowans, M.D. and Holy
Cross Hospital, dba Holy Cross
Breast Center and Holy Cross
Breast Care Service,

Defendants and Appellees.

No. 940599
910907957PI

The petition for rehearing is denied.

Geoffrey J. Butler
Clerk

00136

Exhibit E

FILED IN
4TH DISTRICT COURT
STATE OF UTAH
UTAH COUNTY
Nov 20 1 08 PM '02

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**IN THE FOURTH JUDICIAL DISTRICT COURT
FOR UTAH COUNTY, STATE OF UTAH**

JAMIE MEDVED,

Plaintiff,

vs.

**C. JOSEPH GLENN, M.D. AND BLAYNE
L. HIRSCH, M.D.**

Defendants.

)
) **CERTIFIED COPY OF COMPLAINT**
) **IN SEALE v. GOWANS**
)
)
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) **Case No.: 010400960**

) **Division: 9**
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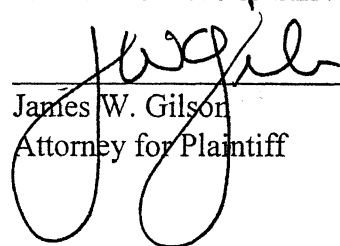
) **Judge: Lynn W. Davis**
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MOTION TO TAKE JUDICIAL NOTICE

The Plaintiff moves the Court to take judicial notice of the Complaint filed in *Seale v. Gowans*, Third District Court Civil No. 910907957 PI, dated December 17, 1991.

DATED this 20th day of November, 2002.

SIEGFRIED & JENSEN


James W. Gilson
Attorney for Plaintiff

DEPUTY COURT CLERK



N. Korne

Hon. **JUDGE RICHARD H. BORTAS**

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4. This Court has subject matter jurisdiction pursuant to Utah Code § 78-3-4 (1988). The controverted amount exceeds \$10,000.00, exclusive of attorneys' fees and costs.

5. This Court has personal jurisdiction and venue. The parties reside in Salt Lake County and the acts of defendants in this lawsuit occurred in Salt Lake County.

CAUSE OF ACTION

6. Beginning in 1985 and continuing through 1991, plaintiff was under the care of Holy Care Breast Care Center, now known as Holy Cross Breast Care Services and, among others physicians, Dr. Gowans. As such, Holy Cross and Dr. Gowans owed a duty of care to the plaintiff to diagnose and report disease, including cancer, of plaintiff's breasts.

7. On May 27, 1988, Holy Cross diagnosed plaintiff as having cancer of her left breast.

8. Defendants breached their duty of care to the plaintiff from August 12, 1987 through May 27, 1988, by failing to diagnose plaintiff's breast cancer.

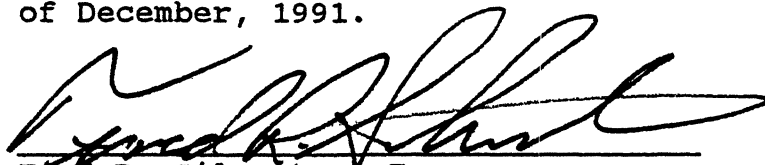
9. Defendants failure to promptly diagnose plaintiff's breast cancer has directly and proximately caused plaintiff's outcome from the cancer to be less favorable and her likelihood of recovery from the cancer less likely, all causing plaintiff special and general damages in amounts to be established at trial.

WHEREFORE, plaintiff prays for judgment in her favor and against the defendants for special and general damages; for her costs incurred herein and for such additional relief as the Court deems appropriate under the circumstances.

JURY DEMAND

Plaintiff demands a trial by jury on all issues presented by this Complaint pursuant to Rule 38(b) of the Utah Rules of Civil Procedure.

DATED this 17th day of December, 1991.


Fred R. Silvester, Esq.
Attorney for Plaintiff

Plaintiff's Address:

1614 South 1400 East
Salt Lake City, Utah 84105

CMH

DISTRICT COURT COVER SHEET

I. (a) PLAINTIFFS

BEVERLY SEALE

DEFENDANTS

DON F. GOWANS, M.D., and HOLY CROSS HOSPITAL,
doing business as HOLY CROSS BREAST CENTER and
HOLY CROSS BREAST CARE SERVICES

(b) ATTORNEYS (Attorney name, Bar #,
Address & Telephone #)

Fred R. Silvester, Esq. 3862

Suitter Axland Armstrong & Hanson
175 South West Temple, Suite 200
Salt Lake City, Utah 84101-1480 532-7300

ATTORNEY (If known)

II. NATURE OF SUIT (Place an X in appropriate category)

DOMESTIC

☐ DA Divorce/Annulment
☐ SM Separate Maintenance
☐ PA Paternity
☐ SA Spouse Abuse
☐ UR URESA Action

PROBATE

☐ ES Estate
☐ GC Guardian/Conservator
☐ NC Name Change
☐ OT Other Probate

ABSTRACTS

☐ AJ Abstract of Judgment
☐ TL Tax Lien

ADOPTIONS

☐ AD Adoption

CIVIL

☐ AA Administrative Agency
☐ AP Appeal
☐ CV Other Civil
☐ CN Contract
☐ CS Custody and Support
☐ HC Writ-Habeas Corpus
☐ PD Property Damage
☒ PI Personal Injury
☐ PR Property Rights (Real)

MISCELLANEOUS

☐ MI Miscellaneous

MENTAL HEALTH

☐ MH Mental Health

III. JURY DEMAND:

☒ YES () NO

Exhibit F

FILED 3-19-03
Fourth Judicial District Court
of Utah County, State of Utah
CARMA B. SMITH, Clerk
Deputy

DENNIS C. FERGUSON (A1061)
WILLIAMS & HUNT
Attorneys for Defendant Estate of Blayne L. Hirsche, M.D.
257 East 200 South, Suite 500
P. O. Box 45678
Salt Lake City, Utah 84145-5678
Phone: (801) 521-5678
Fax: (801) 364-4500

IN THE FOURTH JUDICIAL DISTRICT COURT FOR UTAH COUNTY

STATE OF UTAH

JAMIE MEDVED,

Plaintiff,

v.

C. JOSEPH GLENN, M.D. and ESTATE
OF BLAYNE L. HIRSCH, M.D.,

Defendants.

ORDER GRANTING
DEFENDANTS' MOTION FOR
DISMISSAL WITHOUT
PREJUDICE

Civil No. 010400960

Judge Lynn W. Davis

PROCEDURAL HISTORY

On August 2, 2002, defendants C. Joseph Glenn, M.D. and Blayne L. Hirsche, M.D. filed Defendants' Joint Motion for Dismissal Without Prejudice with a Memorandum of Points and Authorities in Support of Defendants' Joint Motion for Dismissal Without Prejudice.

Plaintiff Jamie Medved filed Plaintiff's Response to Defendants' Joint Motion for Dismissal Without Prejudice on August 14, 2002.

Defendants filed their Joint Reply Memorandum in Support of Defendants' Motion for Dismissal Without Prejudice on September 13, 2002.

On September 24, 2002, defendants filed a Notice to Submit and a Request for Oral Argument.

On November 20, 2002, oral arguments were heard by the Court.

The Court took the matter under advisement at that time.

On November 26, 2002, the Court was informed by an article in the Provo Daily Herald that Dr. Blayne L. Hirsche and his wife were killed in a plane accident. The Court informed the parties that any claim against Dr. Hirsche would have to be filed against his estate.

Plaintiff's Motion for Substitution pursuant to Rule 25 of the Utah Rules of Civil Procedure was filed on December 10, 2002. The Motion requested that the Estate of Blayne L. Hirsche be substituted in the place and stead of Dr. Blayne L. Hirsche. The Court has now executed an Order substituting "The Estate of Blayne L. Hirsche" as defendant.

FACTS

The following facts are admitted by the parties or not in material dispute:

1. Plaintiff first saw Dr. Glenn as a patient in 1991.
2. Plaintiff's last visit with Dr. Glenn was February 27, 1998.
3. During the time plaintiff was Dr. Glenn's patient, she was diagnosed with fibrocystic breast disease.
4. Plaintiff first saw Dr. Hirsche as a patient on July 13, 1998.
5. A mammogram, ordered by Dr. Hirsche and performed on July 20, 1998, revealed dense fibroglandular tissue bilaterally.

6. On August 12, 1998, Dr. Hirsche performed bilateral breast augmentation and aspiration of three suspected right breast cysts.

7. On December 12, 1998, Dr. Hirsche performed an excisional biopsy of three right breast nodules.

8. The pathological examination associated with the December 12, 1998, excisional biopsy revealed the presence of differentiated infiltrating ductal carcinoma.

9. On December 28, 1998, Steven J. Mintz, M.D. performed a right modified radical mastectomy.

10. Plaintiff followed her surgical treatment with chemotherapy and radiation therapy and later had surgical reconstruction.

11. Plaintiff has not had a recurrence of her cancer.

ANALYSIS

Pursuant to Rule 52(a), the Court provides the following statement of the grounds for its decision.

In their Motion for Dismissal Without Prejudice, defendants assert that plaintiff fails to establish a legally recognizable claim. They assert that Utah law does not recognize a cause of action for loss of chance or enhanced risk. In citing Seale v. Gowans, 923 P.2d 1361 (Utah 1996), defendants claim that plaintiff does not have a cause of action until she has shown actual harm and not simply an increased risk of harm. In this case, such actual harm would be evident in the recurrence of cancer. Defendants contend that because plaintiff has not suffered a recurrence of cancer, she cannot claim damages.

Plaintiff responds to these arguments by asserting that Utah law has recognized that liability may be imposed where negligence increases a party's risk of harm. George v. LDS Hospital, 797 P.2d 1117 (Utah App. 1990). Plaintiff further asserts she sustained actual damages in addition to facing a greater risk of cancer recurrence. Namely, plaintiff asserts that due to defendants' negligent diagnosis, she underwent more extensive treatment and surgery including a radical mastectomy. Accordingly, plaintiff claims she has met the requirement of actual injury found in Seale v. Gowans.

In analyzing the claims of each of the parties, the Court finds itself in a difficult position. The Court is sympathetic to plaintiff's claims and is reluctant to limit her potential remedies. However, the Court is convinced that overly speculative claims are not allowed under Utah law. The Court finds Utah law has only recognized liability based on increased risk in narrow circumstances where the increased risk can be analyzed in the context of an injury related to the risk alleged.

For instance, in George v. LDS Hospital the Utah Court of Appeals examined a case where attending nurses failed to inform treating physicians of a patient's failing health. After the patient's health slipped for some time, the physicians were notified of the situation. Shortly thereafter, the patient died. The plaintiff in George asserted that as a result of the nurses' actions, the physicians were unable to perform various treatments that may have improved the patient's health. In the context of this set of facts, the Court of Appeals stated, "[e]vidence which shows a reasonable certainty that negligent delay in diagnosis or treatment increased the need for or lessened the effectiveness of treatment is sufficient to establish proximate cause." Id at 1121 (quoting James v. United States, 483 F.Supp. 581, 585 (N.D.C.A. 1980)).

This Court notes that in George, the finder of fact could determine issues of causation and damages in the context of an actual injury related to the increased risk. In other words, the risk of not recovering could be measured from the perspective that the patient had indeed died. The cases from other jurisdictions cited in George also involved an increased risk analysis in the context of an injury related to the risk alleged. For example, in Hicks v. United States, 368 F.2d 626 (4th Cir. 1966) and Goff v. Doctors General Hospital of San Jose, 333 P.2d 29 (Cal. 1958) the patient at issue in the malpractice action had died.

Seale v. Gowans reaffirms this understanding of the law. In Seale, the plaintiff claimed that a late diagnosis of breast cancer placed her at an increased risk of cancer. The main issue presented in Seale involved the application of the statute of limitations. The defendants asserted that the statute of limitations started to run in 1988 when Ms. Seale discovered that cancer had spread to her lymph nodes—an indication that Ms. Seale’s chances of disease free survival were dramatically reduced. The Court disagreed. The Court found the statute of limitations began to run in 1991 when Ms. Seale discovered cancer had spread to her hip despite her mastectomy and other remedial measures. In explaining this decision, the Seale Court discussed the dangers of a scheme which would force a plaintiff to file a complaint asserting possible or probable future harm in order to avoid the running of the statute of limitations. The Court stated:

[P]laintiffs who are not exhibiting any actual, physical harm . . . would be forced to bring an action for injuries that may or may not occur in the future. However, many of these plaintiffs will be unable to produce the necessary evidence to show that the future harm is more likely to occur than not. Yet if the harm, such as the recurrence of cancer, actually later occurs, the plaintiff would be precluded from any recovery for devastating injuries by reason of having acquired an earlier claim for purely speculative ones. We believe that the better approach is to wait

until the potential harm manifests itself, allowing for more certain proof and fewer speculative lawsuits.
Id. at 1366

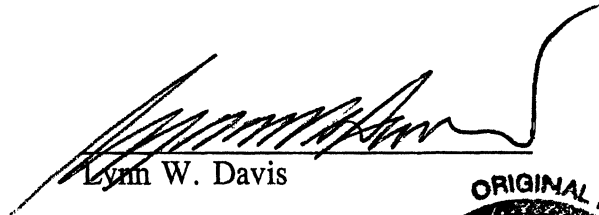
In the present case, the plaintiff has claimed an increased risk of cancer recurrence. She has not, however, claimed the injury related to that increased risk—the actual recurrence of cancer. Instead, plaintiff has claimed that she had to undergo more extensive treatment. The Court is unconvinced this injury is sufficiently related to the risk alleged. It appears to be an independent result of the alleged malpractice. The injury in no way helps the court identify issues of causation or damages associated with the increased risk. Nor does the injury help curtail speculation as to some yet unrealized harm.

The lack of an injury clearly related to the increased risk is very problematic and troubling to the Court. On the most practical level, the Court cannot conceive how jury instructions for damages on the claim could be presented without asking jurors to speculate on what may or may not occur in the future. Such broad speculation has not been approved by Utah courts.

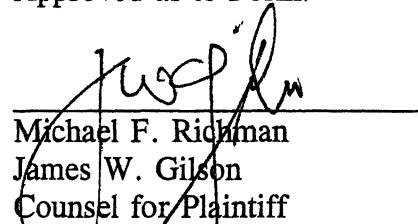
Utah law has not recognized claims of increased risk in the absence of a related injury. Plaintiff has claimed an increased risk of cancer recurrence, but has not claimed an injury clearly related to that risk. Accordingly, the Court finds no legally recognized claim and hereby ORDERS that plaintiff's legal action and claims against defendants be and the same are hereby dismissed without prejudice. Each of the parties shall bear her, his or its respective costs and attorney's fees.

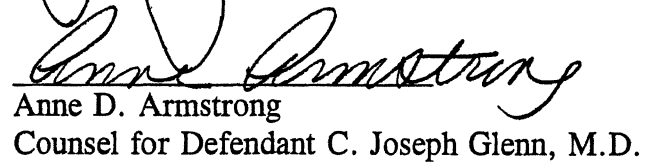
DATED this 19 day of March, 2003.

BY THE COURT:


Lynn W. Davis

Approved as to Form:


Michael F. Richman
James W. Gilson
Counsel for Plaintiff


Anne D. Armstrong
Counsel for Defendant C. Joseph Glenn, M.D.



AFFIDAVIT OF SERVICE

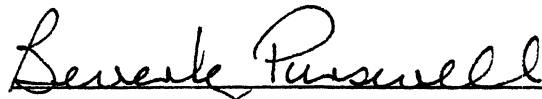
STATE OF UTAH)
 : ss.
COUNTY OF SALT LAKE)

Beverly Purswell, being duly sworn, says that she is employed in the law offices of Williams & Hunt, attorneys for Estate of Blayne L. Hirsche, M.D., defendant herein; that she served the *proposed* attached **ORDER GRANTING DEFENDANTS' MOTION FOR DISMISSAL WITHOUT PREJUDICE** in Civil No. 010400960 before the Fourth Judicial District Court for Utah County, State of Utah, upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

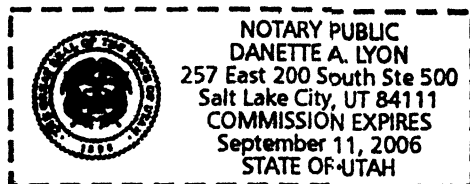
Counsel for Plaintiff
Michael F. Richman
James W. Gilson
SIEGFRIED & JENSEN
5664 S. Green Street
Salt Lake City, UT 84123

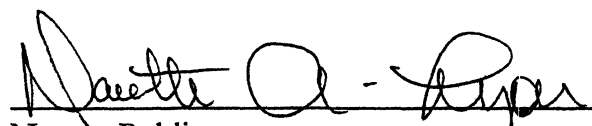
Counsel for Defendant C. Joseph Glenn, M.D.
Curtis J. Drake
Anne D. Armstrong
SNELL & WILMER
15 W. South Temple, Suite 1200
Salt Lake City, UT 84101

and causing the same to be mailed first class, postage prepaid, on the 13th day of March, 2003.


Beverly Purswell

SUBSCRIBED AND SWORN TO before me this 13th day of March, 2003.




Notary Public